In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 779

ELISHAS GEORGE ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 38a–42a) is reported at 239 F. Supp. 752. The court of appeals' order dismissing the appeal as moot (Pet. App. 71a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1965 (Pet. App. 72a). The petition for a writ of certiorari was filed on November 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

797-616—65

QUESTION PRESENTED

Whether petitioner's appeal was correctly dismissed as moot.

STATEMENT

At 5:45 on the evening of March 15, 1965, petitioner Elishas George voluntarily sought admission to the Veterans Administration Hospital at West Haven, Connecticut, where he was accepted for treatment of a bleeding ulcer (Pet. App. 60a–62a). The examining physicians determined that Mr. George was "seriously anemic by reason of bleeding from his gastrointestinal tract * * * that he had lost approximately 60 to 65% of his red cells," that his condition was "precarious" and that "any further significant blood loss would result in shock and the likelihood of death within a relatively short time" (Pet. App. 29a). Both the Chief of the Medical Service and the Chief of the Surgical Service of the Veterans Hospital concluded that the "accepted standards of medical care" required the immediate transfusion of four to five pints of whole blood (Pet. App. 29a–30a).

Petitioner George was a convert to the religious sect commonly known as "Jehovah's Witnesses" (Pet. App. 41a). The tenets of that sect prohibit its members from accepting blood transfusions, and petitioner refused to give formal consent to any such transfusions.[1] From the time of his admission to the hos-

[1] Mr. George's wife, also a Jehovah's Witness, similarly refused her consent to the transfusions. Both petitioners signed papers purporting to release the government and the hospital staff from liability if Mr. George's death should result from the failure to transfuse (Pet. App. 36a). Mr. George's mother (not a Jehovah's Witness) was of the view that the

pital, however, petitioner repeatedly stated to the attending doctors and nurses that although he could not consent to receiving blood transfusions, he would not resist any attempt to administer such transfusions to him (Pet. App. 54a, 60a, 68a).

Mr. George's condition deteriorated on the following day. To protect the government and medical personnel against civil or criminal liability in case of petitioner's death, the hospital administration requested the United States Attorney to obtain a court ruling. Accordingly, the next morning, March 17, 1965, the government instituted an action against both petitioners in the district court seeking a declaratory judgment of the rights and liabilities of the Veterans Hospital and its staff on one hand and the Georges and their children on the other (Pet. App. 26a). On the same day, an Assistant United States Attorney personally informed Mrs. George of the institution of the suit and advised her to obtain counsel promptly (Pet. App. 52a).

On the evening of the day that the suit was instituted, Mr. George's condition became critical (Pet. App. 29a–30a). At 6:30 p.m. the United States Attorney telephoned the district judge and requested a temporary order authorizing blood transfusions to keep Mr. George alive pending a full hearing on the suit (Pet. App. 39a). District Judge Zampano thereupon proceeded to the Veterans Hospital where he questioned the doctors and the Georges in the hospital

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necessary transfusions should be administered (Pet. App. 41a). The Georges' four children, all minors, apparently were not consulted.

room from 8:00 to 10:15 p.m. (Pet. App. 39a). The attending physicians unequivocally stated that immediate blood transfusions were necessary to keep Mr. George alive (Pet. App. 40a). When the judge advised Mr. George that he "had no power to force a transfusion upon him" (Pet. App. 40a), petitioner's response was the same as he had given the doctors: "he would not agree to be transfused but would in no way resist a court order permitting it, because it would be the Court's will and not his own" (Pet. App. 13a, 40a).

Having determined that petitioner George wanted the transfusions, and in fact would "welcome them," so long as formal responsibility for their authorization rested elsewhere (Pet. App. 12a, 24a), the district court signed a temporary order authorizing the hospital to "administer such blood transfusions as are in the opinion of the physicians in attendance necessary to save [Mr. George's] life" (Pet. App. 41a). The necessary blood transfusions were then administered. Although the restraint and sedation under which he was placed were not disabling, the patient offered no resistance (Pet. App. 48a–51a, 55a).

On March 22, 1965, the government moved to dissolve the temporary order and to withdraw its complaint because Mr. George was no longer *in extremis;* several days of psychiatric examination had revealed that he was *compos mentis* and appreciated the consequences of his refusal; waivers signed by Mr. and Mrs. George appeared adequate to protect the government and its employees from liability; and examination of Connecticut law had disclosed no statutes or cases making criminal the failure to transfuse an

unwilling mentally competent adult (Pet. App. 32a–33a). After initially permitting the complaint to be withdrawn (Pet. App. 38a, 43a), the court, on petitioners' request, reopened the matter (Pet. App. 56a). Petitioners then filed an answer which demanded, in substance, a declaratory judgment that the blood transfusions given to Mr. George violated his constitutional rights under the First and Fifth Amendments, and an order permanently enjoining the government from any further attempt to transfuse blood to Mr. George.

At a hearing held on May 6, 1965, the government introduced affidavits establishing, *inter alia,* that on March 27, 1965, Mr. George had been discharged from the West Haven Veterans Administration Hospital to the care of his private physician (Pet. App. 51a)[2] and therefore moved to dismiss the proceeding as moot (Pet. App. 7a). Petitioners made an offer of proof to the effect, *inter alia,* that Mr. George "is still suffering from his bleeding ulcer, is still eligible to, and may well require, treatment at the Veterans Administration Hospital * * *" (Pet. App. 16a). Treating petitioners' papers as a counterclaim for declaratory relief, the district court dismissed the counterclaim and reinstated its prior order dismissing the government's action (Pet. App. 56a). After hearing argument the court of appeals granted the government's motion to dismiss the appeal as moot (Pet. App. 71a–72a).

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[2] Mr. George was discharged as "asymptomatic" (Pet. App. 61a), that is, he showed no manifestations of a disordered functioning of the body. *Dorland's Medical Dictionary* (1960 Ed.).

ARGUMENT

Petitioners ask this Court, as they did the courts below, to determine whether government officials infringe the constitutional rights of a Jehovah's Witness by subjecting him to a blood transfusion against his will. Not only is this issue moot, as the court of appeals held, but it is not actually presented by the record in this case.

1. Mr. George was discharged from the Veterans Administration Hospital into the care of his private physician about nine months ago and the temporary order authorizing the blood transfusions which saved his life is no longer in effect. Nor is there reason in the record to suppose that petitioner's return to the hospital is imminent. Moreover, since Mr. George's condition does not stem from his military service, any future admission to a Veterans Administration Hospital is contingent upon the availability of hospital facilities beyond those necessary to treat veterans with service-connected disabilities and upon his inability personally to defray the cost of medical expenses. 38 U.S.C. 610, 612. Indeed, his refusal of reasonable medical treatment under accepted standards of medical care constitutes grounds upon which the Veterans Administration may decline to treat him in the future.[3] Hence recurrence of the issue involved here is, at best, conjectural.

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[3] Veterans Administration, *Department of Medicine and Surgery Manual* M–1, Part I, Ch. 1, Sec. 1I, Para. 1I.05:

> a. *Failure to Cooperate with Medical Staff.* A patient who fails to cooperate with the medical staff under the following circumstances will be discharged against medical advice:
>
> (1) * * *.

In these circumstances, the court below properly dismissed the appeal as moot. *Oil Workers Unions* v. *Missouri,* 361 U.S. 363; *Williams* v. *Simons,* 355 U.S. 49; *Harris* v. *Battle,* 348 U.S. 803; *Bus Employees Union* v. *Wisconsin Board,* 340 U.S. 416; *Eastern Airlines, Inc.* v. *Civil Aeronautics Board,* 185 F. 2d 426 (C.A.D.C.), vacated and ordered dismissed as moot, 341 U.S. 901; *Application of President & Directors of Georgetown College,* 331 F. 2d 1000, rehearing *en banc* denied, 331 F. 2d 1010 (C.A.D.C.), certiorari denied, 377 U.S. 978. This dismissal was particularly appropriate since petitioners were attempting to litigate significant constitutional questions. It is settled that federal courts do not decide such issues on abstract considerations or hypothetical possibilities. *Poe* v. *Ullman,* 367 U.S. 497, 501–509.[4]

2. In any event, while Mr. George declined to give his express consent to blood transfusions, his accompanying actions and remarks cast substantial doubt upon the real meaning of his "formal" refusal (pp.

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(2) Refuses, neglects, or obstructs reasonable treatment. Refusal of offered treatment will be measured by the decision that would have been made under the circumstances by an ordinarily reasonable person. If a person of ordinary judgment and prudence, with no question of compensation being involved, would have accepted the offered treatment, the treatment is considered reasonable and the refusal thereof by a patient may be considered unreasonable.

[4] Petitioners' citations (Pet. pp. 13–17) of State court decisions in which issues of public importance were decided by the courts even though moot are irrelevant. *Oil Workers Unions* v. *Missouri,* 361 U.S. 363, 367. *Henderson* v. *United States,* 339 U.S. 816, cited at page 15 of the petition, neither involves nor discusses mootness.

3–4, *supra*). It was reasonable for the district court to infer from his conduct that Mr. George wanted a transfusion but did not wish expressly to ask for blood. See Pet. App. 12a, 24a. Hence the record fails to present a clear-cut question as to the constitutional rights of one who unequivocally objects to blood transfusions necessary to save his life.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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